Bluedream City Development Sdn Bhd v Pembinaan Bina Bumi Sdn Bhd and another case

HIGH COURT (SHAH ALAM) — ORIGINATING SUMMONS NOS BA-24C-27–03 OF 2020 AND BA-24C-76–08 OF 2020
WONG KIAN KHEONG J
23 FEBRUARY 2020

Building and Construction Law — Adjudication — Construction Industry Payment and Adjudication Act 2012 ('CIPAA') — Application to set aside adjudication decision ('AD') — Whether party applying to High Court under s 15 of CIPAA to set aside AD and party resisting the same could rely on 'new evidence' not adduced during the adjudication proceedings — Whether party applying to enforce AD could also rely upon 'new evidence' to support its application — Whether parties relying upon 'new evidence' must give reasonable explanation why such evidence was not adduced during the adjudication proceedings — Whether failure to give reasonable explanation might affect court's view of the bona fides of such evidence and the weight to be attached to it — Whether court in deciding application to set aside AD under s 15 of CIPAA was not exercising an appellate or supervisory function

The plaintiff in the first originating summons herein ('BCD') appointed the defendant ('PBB') to carry out building construction works. PBB completed the works and claimed for payment. The parties entered into a settlement agreement ('SA') under which BCD agreed to pay PBB RM6,103,387.64 owing under certain interim certificates. PBB claimed that the amount of RM5,510,197.91 due to it under 'Interim Certificate No 4R' ('IC No 4R') was not included in the SA but BCD contended that it was. To resolve the dispute, PBB commenced adjudication proceedings against BCD under the Construction Industry Payment and Adjudication Act 2012 ('the CIPAA'). The adjudicator decided that the SA did not include the amount stated under IC No 4R and ruled that that amount was also payable by BCD (the adjudication decision or 'AD'). In its originating summons ('OS') herein, PBB applied for leave of court to enforce the AD but BCD in its instant OS applied to set aside the AD and stay its enforcement pending the disposal of arbitration proceedings between the parties. A novel question that arose at the hearing of the instant applications was whether BCD could rely on evidence that had not been tendered in the adjudication proceedings to set aside the AD. Other issues included whether: (a) the adjudicator lacked jurisdiction or exceeded his jurisdiction in adjudicating PBB's claim; (b) the adjudicator had breached the rule of natural justice in not properly considering the SA and/or BCD's evidence and in not dealing with all the contentions raised by BCD in the adjudication proceedings; (c) PBB's failure to act on its claim for almost four

years estopped it from pursuing its claim in the adjudication proceedings; and (d) the evidence sought to be adduced by BCD in support of its OS was precluded by ss 91 and 92 of the Evidence Act 1950.

Held, dismissing BCD's OS and allowing PBB's OS:

(1) Nothing in s 15 or any other provision in the CIPAA prevented a party applying to set aside an AD from adducing evidence that it had not adduced during the adjudication proceedings. This was especially so when such evidence concerned a matter which had occurred after the AD was delivered. It would be unjust to preclude such evidence where the party could not have, with reasonable diligence, procured such evidence in the adjudication proceedings. There was also the possibility that after conclusion of the adjudication proceedings, a party might obtain new evidence to substantiate any of the grounds stipulated in s 15(a)–(d) of the CIPAA to set aside the AD. Similarly, s 15 did not prevent a party in whose favour the AD was made from tendering 'new evidence' to resist the application to set aside the AD or to support its own application for leave to enforce the AD under s 28(1) and (2) of the CIPAA (see para 11).

(2) Given the strict timelines which an adjudicator had under s 12(2) and (3) of the CIPAA to deliver his decision and which the parties had to produce documents in the proceedings as set by the adjudicator, it was understandable if the parties might inadvertently fail to adduce the 'new evidence' in the adjudication proceedings. No prejudice would be occasioned if the new evidence was admitted in the setting aside application as it was open to the opposing party to rebut such evidence. However, if either party adduced new evidence in respect of the setting aside application, a reasonable explanation should be given as to why such evidence was not tendered in the adjudication proceedings. The absence of a reasonable explanation might cast doubts on the bona fides in adducing the new evidence or affect the weight to be given to it (see para 11).

(3) In the instant case, the 'new evidence' BCD sought to adduce did not support its setting aside application because: (a) ss 91 and 92 of the Evidence Act 1950 precluded the evidence from being admitted to contradict, vary, add to or subtract from the written terms of the SA; and (b) the new evidence concerned matters which arose before the adjudication and no reason was given why it was not tendered in the adjudication proceedings (see paras 12 & 14).

(4) Applying a commercially sensible construction to the SA, the adjudicator correctly decided that the SA did not extinguish BCD's liability to pay PBB the amount stated in IC No 4R since the SA only referred to

settlement by BCD of the sum of RM6,103,387.64 pertaining to Certificates Nos 28–35. There was no mention of IC No 4R in the SA (see para 16).

(5) Since the SA did not include IC No 4R, PBB had a valid cause of action against BCD and the adjudicator had jurisdiction to adjudicate PBB's claim. The adjudicator did not exceed his jurisdiction in deciding that the SA did not include the sum stated in IC No 4R. If his decision on that point was an error of law, it was easily remediable in the arbitration because the AD was only 'temporarily final' and was subject to arbitration under s 13(c) of the CIPAA. Even if the adjudicator had erred in his construction of the SA or of any other document, the court could not set aside the AD as the court was not exercising any appellate or supervisory jurisdiction when deciding an application to set aside the AD (see paras 19–20, 23 & 30–33).

(6) The adjudicator had not breached the second rule of natural justice under ss 15(b) and 24(c) of the CIPAA as he had clearly considered BCD's defence regarding the SA and had given BCD its right to adduce evidence and to submit on all questions which arose in the adjudication. Even if there was a breach of the second rule, the Court would still not set aside the AD because: (a) there was no 'real possibility' that if not for the breach, the adjudicator would have reached a different decision; and (b) BCD had not adduced evidence to show that the alleged breach was decisive or material to the AD to warrant the AD being set aside (see paras 25–27).

(7) PBB was not estopped by its own conduct from adjudicating its claim because: (a) evidence was tendered that PBB only realised after an audit of its accounts in March 2019 that BCD still owed the sum under IC No 4R; (b) the adjudicator found no evidence that PBB had waived its claim by acquiescence; and (c) even if the adjudicator had erred in not applying the doctrine of estoppel against PBB, the error could be remedied in the arbitration (see para 38).

(8) BCD's application to stay the enforcement of the AD had to be dismissed because: (a) the adjudicator had not made any clear and unequivocal error in the AD; (b) PBB was an on-going business concern and there was no evidence to show that it was unable to pay its debts or had a debt-recovery suit or winding up petition filed against it; and (c) there was no evidence to show that PBB would be unable to repay the sum adjudicated in the AD if BCD had paid the sum to PBB and was subsequently successful in the arbitration. No grounds were shown why a stay should be granted (see paras 43–45).

[Bahasa Malaysia summary

Plaintif di dalam saman pemula ini ('BCD') melantik defendan ('PBB') untuk menjalankan kerja-kerja pembinaan bangunan. PBB telah menyelesaikan kerja-kerja dan menuntut bayaran bagi upah pembinaan tersebut. Kedua-dua pihak telah memeterai perjanjian penyelesaian ('PP') di mana BCD bersetuju untuk membayar PBB sebanyak RM6,103,387.64 kerana di bawah sijil interim tertentu. PBB mendakwa bahawa jumlah RM5,510,197.91 kerana di bawah 'Sijil Interim No 4R' ('IC No 4R') tidak termasuk dalam PP tetapi BCD tidak bersetuju. PBB kemudiannya memfailkan prosiding adjudikasi terhadap BCD di bawah Akta Pembayaran dan Adjudikasi Industri Pembinaan 2012 ('APAPIP'). Adjudikator memutuskan bahawa PP tidak termasuk jumlah yang dinyatakan di bawah IC No 4R dan memerintah bahawa jumlah tersebut perlu dibayar oleh BCD ('keputusan adjudikasi'). Di dalam saman pemulanya ('SP') di sini, PBB memohon kebenaran mahkamah untuk menguatkuasakan AD tetapi BCD dalam SP ini memohon untuk mengenepikan keputusan adjudikasi tersebut dan menggantung penguatkuasaannya sementara menunggu pelupusan prosiding timbang tara antara kedua-dua pihak. Isu di dalam permohonan ini adalah sama ada BCD boleh bergantung kepada bukti yang belum dikemukakan dalam prosiding adjudikasi untuk mengenepikan keputusan adjudikasi. Isu-isu lain adalah: (a) sama ada adjudikator tidak mempunyai bidang kuasa atau melebihi bidang kuasanya dalam menilai tuntutan PBB; (b) adjudikator telah melanggar prinsip keadilan semla jadi dengan tidak mempertimbangkan bukti yang dikemukakan oleh PP dan/atau BCD dan tidak menyelesaikan semua isu yang dibangkitkan oleh BCD dalam prosiding adjudikasi; (c) kegagalan PBB untuk bertindak ke atas tuntutannya selama hampir empat tahun di dalam prosiding adjudikasi; dan (e) keterangan yang dibangkitkan oleh BCD untuk menyokong SP telah dihalang oleh ss 91 dan 92 Akta Keterangan 1950.

Diputuskan, menolak SP BCD dan membenarkan SP PBB:

(1) Tiada apa-apa dalam s 15 atau mana-mana peruntukan lain di dalam APAPIP menghalang pihak yang memohon untuk mengenepikan keputusan adjudikasi tersebut daripada menambah bukti keterangan semasa prosiding adjudikasi. Ini terutamanya apabila bukti sedemikian mengenai perkara yang telah berlaku selepas keputusan adjudikasi diberikan. Adalah tidak adil untuk menghalang keterangan tersebut di mana pihak tersebut tidak boleh mempunyai bukti tersebut semasa prosiding adjudikasi. Terdapat juga kemungkinan bahawa selepas berakhirnya prosiding adjudikasi, pihak-pihak mungkin mendapatkan bukti baru untuk membuktikan mana-mana alasan yang ditetapkan dalam s 15(a)–(d) APAPIP untuk mengetepikan keputusan adjudikasi. Seksyen 15 juga tidak menghalang mana-mana pihak daripada mengemukakan 'bukti baru' untuk menolak permohonan untuk mengenepikan keputusan adjudikasi atau menyokong permohonannya

sendiri untuk kebenaran menguatkuasakan keputusan adjudikasi di bawah s 28(1) dan (2) APAPIP (lihat perenggan 11).

(2) Memandangkan terdapat tarikh masa akhir untuk adjudikator di bawah s 12(2) dan (3) APAPIP untuk menyampaikan keputusannya dan pihak-pihak yang perlu mengemukakan dokumen dalam prosiding seperti yang ditetapkan oleh adjudikator, adalah munasabah sekiranya pihak-pihak mungkin secara tidak sengaja gagal menambah 'bukti baru' di dalam prosiding adjudikasi. Prejudis tidak akan berlaku sekiranya bukti baru tersebut diterima dalam permohonan mengetepikan kerana ia terbuka kepada pihak lawan untuk menanggalkan keterangan tersebut. Walau bagaimanapun, jika mana-mana pihak menambah bukti baru di dalam permohonan mengenepikan keputusan, alasan yang munasabah harus diberikan atas alasan keterangan tersebut tidak dikemukakan dalam prosiding adjudikasi. Ketiadaan alasan yang munasabah mungkin menimbulkan keraguan mengenai isu 'bona fides' dalam mengemukakan keterangan baru tersebut (lihat perenggan 11).

(3) Di dalam kes ini, bukti baru yang dikemukakan BCD tidak menyokong permohonan mengenepikan keputusan adjudikasi tersebut kerana ss 91 dan 92 Akta Keterangan 1950 menghalang keterangan daripada diterima bercanggah, berbeza-beza, menambah atau menolak daripada terma bertulis PP, dan keterangan baru berkenaan perkara-perkara yang timbul sebelum adjudikasi dan tiada alasan diberikan mengenai keterangan tersebut tidak diberikan di dalam prosiding adjudikasi (lihat perenggan 12 & 14).

(4) Mengguna pakai tafsiran komersial kepada PP tersebut, adjudikator adalah betul dalam memutuskan bahawa PP tidak mengenepikan liabiliti BCD untuk membayar PBB jumlah yang dinyatakan dalam IC No 4R kerana PP tersebut hanya merujuk kepada penyelesaian oleh BCD dengan jumlah RM6,103,387.64 berkaitan dengan Sijil No 28–35 dan tidak menyebutkan IC No 4R di SA (lihat perenggan 16).

(5) Memandangkan PP tersebut tidak memasukkan IC No 4R, PBB mempunyai alasan yang sah tindakan dimasukkan terhadap BCD dan adjudikator tersebut mempunyai bidang kuasa untuk menilai tuntutan PBB. Adjudikator tersebut juga tidak melebihi bidang kuasanya dalam memutuskan bahawa PP tidak termasuk jumlah yang dinyatakan dalam IC No 4R. Sekiranya keputusannya pada ketika itu adalah satu kesilapan undang-undang, ianya boleh diperbaiki di dalam timbang tara kerana keputusan adjudikasi hanya 'muktamad secara sementara' dan tertakluk kepada prosiding timbang tara di bawah s 13(c) APAPIP. Walaupun adjudikator telah terkhilaf dalam mentafsirkan SA atau mana-mana dokumen lain, mahkamah ini tidak dapat mengenepikan PP kerana mahkamah ini tidak terlibat dengan perkara kuasa rayuan untuk memutuskan permohonan untuk mengenepikan keputusan adjudikasi

(lihat perenggan 19–20, 23 & 30–33).

(6) Adjudikator tidak melanggar peraturan kedua prinsip keadilan semula jadi di bawah ss 15(b) dan 24(c) APAPIP kerana beliau telah dengan jelas mempertimbangkan pembelaan BCD mengenai PP dan telah memberikan BCD haknya untuk menambah keterangan di dalam prosiding adjudikasi tersebut. Walaupun terdapat pelanggaran peraturan kedua tersebut, mahkamah ini masih tidak akan mengenepikan PP tersebut kerana: (a) tiada 'kemungkinan sebenar' bahawa sekiranya bukan kerana pelanggaran itu, adjudikator akan mencapai keputusan yang berbeza; dan (b) BCD tidak menambah keterangan untuk menunjukkan bahawa pelanggaran yang didakwa tersebut adalah material kepada PP untuk diketepikan (lihat perenggan 25–27).

(7) PBB tidak diestop dengan perlakuannya sendiri untuk menilai tuntutannya kerana: (a) keterangan telah dikemukakan bahawa PBB hanya menyedari audit akaunnya pada bulan Mac 2019 bahawa BCD masih berhutang jumlah di bawah IC No 4R; (b) adjudikator mendapati tiada keterangan bahawa PBB telah mengenepikan tuntutannya melalui perlepasan; dan (c) walaupun adjudikator telah terkhilaf tidak menggunakan doktrin estoppel terhadap PBB, kesalahan tersebut masih boleh diperbaiki di dalam prosiding timbang tara (lihat perenggan 38).

(8) Permohonan BCD untuk menggantung perlaksanaan PP terpaksa ditolak kerana: (a) adjudikator tidak membuat sebarang kekhilafan yang jelas dalam keputusan adjudikasi tersebut; (b) tiada keterangan oleh PBB yang menunjukkan bahawa mereka tidak dapat membayar hutangnya atau mempunyai tuntutan perlaksanaan hutang atau petisyen penggulungan yang difailkan terhadapnya; dan (c) tiada keterangan yang menunjukkan bahawa PBB tidak dapat membayar balik jumlah yang dinyatakan dalam keputusan adjudikasi tersebut sekiranya BCD telah membayar jumlah tersebut kepada PBB dan kemudiannya telah berjaya di dalam prosiding timbang tara tersebut. Tiada alasan penggantungan perlaksanaan diberikan (lihat perenggan 43–45).]

Cases referred to

ACFM Engineering & Construction Sdn Bhd v Esstar Vision Sdn Bhd and another appeal [2016] MLJU 1776, CA (refd)

Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd [2010] 1 MLJ 597, FC (refd)

Far East Holdings Bhd & Anor v Majlis Ugama Islam dan Adat Resam Melayu Pahang and other appeals [2018] 1 MLJ 1, FC (refd)

Guangxi Dev & Cap Sdn Bhd v Sycal Bhd [2018] MLJU 1542; [2019] 1 CLJ 592, CA (refd)

Ho Shee Jan v Hadayat Harta Holdings Sdn Bhd [1989] 1 MLJ 33, SC (refd)

A *Inai Kiara Sdn Bhd v Puteri Nusantara Sdn Bhd* [2019] 2 MLJ 362; [2019] 2 CLJ 229, CA (refd)
Kurniaan Maju Sdn Bhd v HSA Setiamurni Sdn Bhd [2020] 9 MLJ 103, HC (refd)
Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor [1995] 1 MLJ 719,
B CA (refd)
MKP Builders Sdn Bhd v PC Geotechnic Sdn Bhd and another case [2020] MLJU 1927, HC (refd)
MRCB Builders Sdn Bhd v Wazam Ventures Sdn Bhd and another case [2020] MLJU 208; [2020] 5 MLRH 138, HC (refd)
C *Naza Engineering & Construction Sdn Bhd v SSL Dev Sdn Bhd* [2020] 9 MLJ 499, HC (refd)
Otis Elevator Company (M) Sdn Bhd v Castmet Sdn Bhd and another case [2020] MLJU 2306, HC (refd)
D *Prestij Mega Construction Sdn Bhd v Personal Representative of Estate of Vinayak Pradhan Prabhakar (deceased) & Ors and other cases* [2021] MLJU 60; [2021] AMEJ 48, HC (refd)
Ranhill E & C Sdn Bhd v Tioxide (M) Sdn Bhd and other appeals [2015] MLJU 1873; [2015] 1 LNS 1435, HC (refd)
E *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229, FC (refd)
View Esteem Sdn Bhd v Bina Puri Holdings Bhd [2018] 2 MLJ 22; [2019] 5 CLJ 479, FC (refd)

Legislation referred to

F Construction Industry Payment and Adjudication Act 2012 ss 5, 6, 12(2)(a), (2)(b), (2)(c), (3), (4), 13(a), (c), 15, 15(a), (b), (c), (d), 16, 16(1)(b), 24(c), 25(c), 27(1), 28(1), (2)
Evidence Act 1950 ss 91, 92, 92(a), (b), (c), (d), (e), (f)

G *Sanjay a/l Mohanasundaram (Wong Li Wei and Mak Kit Teng with him) (Sanjay Mohan) in Originating Summons No BA-24C-27–03 of 2020 for the plaintiff.*
Lam Wai Loon (Serene Hiew Mun Yi and Pan Yew Teng with him) (Ko & Partners) in Originating Summons No BA-24C-76–08 of 2020 for the plaintiff.
H *Lam Wai Loon (Serene Hiew Mun Yi and Pan Yew Teng with him) (Ko & Partners) in Originating Summons No BA-24C-27–03 of 2020 for the defendant.*
Sanjay a/l Mohanasundaram (Wong Li Wei and Mak Kit Teng with him) (Sanjay Mohan) in Originating Summons No BA-24C-76–08 of 2020 for the
I *defendant.*

Wong Kian Kheong J:

A. INTRODUCTION

[1] This judgment concerns a joint hearing of the following two originating summonses ('OS'):

(a) Bluedream City Development Sdn Bhd ('BCD') has filed OS No BA-24C-27–03 of 2020 ('BCD's OS') against Pembinaan Bina Bumi Sdn Bhd ('PBB') for an order that an adjudication decision made on 4 February 2020 ('AD') by an adjudicator, Mr Chua Seow Kwang ('adjudicator'), in favour of PBB against BCD be set aside ('BCD's setting aside application'); and

(b) PBB has filed OS No BA-24C-76–08 of 2020 for leave of court to enforce the AD against BCD ('PBB's enforcement application').

B. BACKGROUND

[2] By way of a 'letter of award' dated 3 September 2014 ('LA'), BCD appointed PBB to carry out 'main building and infrastructure works' ('works') in a condominium project ('project').

[3] PBB completed the works and claimed payment for the works.

[4] BCD and PBB entered into a 'settlement agreement' on 30 October 2018 ('SA'). Regarding the SA:

(a) PBB claimed that the SA did not include an 'Interim Certificate No 4R' ('IC No 4R') issued by BCD to PBB for a sum of RM5,510,197.91 ('sum (ICR No 4R)') to be paid by BCD to PBB ('PBB's claim'); and

(b) BCD alleged that the SA included, among others, the sum (ICR No 4R).

[5] PBB commenced adjudication proceedings against BCD based on PBB's claim ('adjudication'). BCD was represented in the adjudication by the same firm of solicitors who appeared for BCD in these two OS. At the adjudication, the adjudicator adjudicated, delivered the AD as follows, among others:

(a) BCD shall pay the sum (ICR No 4R) to PBB;

(b) interest on the sum (ICR No 4R) shall be paid by BCD to PBB as stipulated in the AD; and

(c) BCD shall pay to PBB costs of the adjudication, costs of the adjudicator and all other fees as specified in the AD.

C. LEGAL PROCEEDINGS

[6] In BCD's OS:

(a) BCD filed a notice of application ('NA') in court encl No 17 ('encl 17') under s 16(1)(b) of the Construction Industry Payment and Adjudication Act 2012 ('the CIPAA') to stay the enforcement of the AD pending the disposal of an arbitration between BCD and PBB ('arbitration'). PBB had resisted encl 17;

(b) in BCD's second affidavit in support of BCD's setting aside application affirmed by Ms Lim See Tow, BCD's Chief Operating Officer ('Ms Lim') on 25 August 2020 ('BCD's second affidavit'), BCD had relied on documents exhibited in exhs A1–A6 ('BCD's evidence'). BCD's evidence:

(i) had not been adduced in the adjudication; and

(ii) included a letter dated 25 March 2015 ('exh A5') from BCD to Messrs 'YF Lee Quantity Surveyors' ('QS'). According to exh A5, among others:

(A) there was a meeting between BCD's Datin Dian Lee (BCD's Managing Director), Ms Lim and Mr Stanley on the one part with Dato' Darren Kwan ('Dato' Kwan'), Mr Desmond and Mr Yee from PBB on the other part; and

(B) as BCD had accepted PBB's proposal, BCD requested the QS to revise QS's 'Valuation Report No 4 with an additional amount at the range of RM5 million as a Variation Order to facilitate (PBB's) proposal' and the 'over certification in the revised valuation shall be adjusted accordingly in the later stage to reflect the over certification';

(c) PBB had objected strenuously to the admissibility of BCD's evidence in these two OS. In fact, Dato' Kwan, PBB's director, had made a police report on 1 October 2020 ('Dato' Kwan's police report') which stated as follows:

(i) Dato' Kwan did not receive exh A5; and

(ii) the first time Dato' Kwan had sight of exh A5 was when he read BCD's second affidavit;

(d) before I delivered my oral grounds for the two OS, I drew the attention of BCD's learned lead counsel, Mr Sanjay a/l Mohanasundaram, to the fact that a stay application pursuant to s 16(1)(b) of the CIPAA should not be made in a NA (such as encl 17) because generally, the court should not make an order in a NA (filed in an OS) which has not been applied for in the OS — please refer to *MRCB Builders Sdn Bhd v Wazam Ventures Sdn Bhd and another case* [2020] MLJU 208; [2020] 5 MLRH 138 at [36];

(e) Mr Sanjay had the candour to admit that encl 17 was filed erroneously. He then applied orally to:

(i) withdraw encl 17 with no order as to costs; and

(ii) add another prayer in BCD's Setting Aside OS for a stay of the execution of the AD pending the outcome of the arbitration ('BCD's stay application');

(f) in the finest tradition of the Bar, Mr Lam Wai Loon, PBB's learned lead counsel, did not object to Mr Sanjay's oral application. Consequently:

(i) I struck out encl 17 with no liberty to file afresh and with no order as to costs; and

(ii) this court allowed BCD to insert a new prayer in BCD's OS regarding BCD's stay application with a further order for BCD to e-file the amended BCD's OS but BCD was exempted from serving the amended BCD's OS on PBB's solicitors.

[7] As explained in *Otis Elevator Company (M) Sdn Bhd v Castmet Sdn Bhd and another case* [2020] MLJU 2306, I adopt the following approach in deciding these two OS:

(a) this court will first decide BCD's setting aside application. If the court sets aside the AD, there is no necessity to decide BCD's stay application and PBB's enforcement application must be dismissed;

(b) if BCD's setting aside application is dismissed, BCD's stay application will then be determined. If this court allows BCD's stay application, PBB's enforcement application should be refused; and

(c) if this court dismisses BCD's stay application, I will then proceed to decide PBB's enforcement application.

D. ISSUES

[8] The following questions arise in these two OS:

(a) can a party (X) who has applied to set aside an adjudication decision under s 15(a)–(d) of the CIPAA ('X's setting aside application') rely on evidence which has not been adduced by X before the adjudicator ('new evidence') to support X's setting aside application? This is a novel question;

(b) if the answer to the above issue is 'yes', did X provide a reasonable explanation in X's affidavit filed in support of X's setting aside application on why the new evidence could not be tendered by X in the adjudication proceedings?

A (c) did the SA include the sum (ICR No 4R)? In this regard:

(i) can BCD's evidence or any extrinsic evidence be admitted in BCD's setting aside application under ss 91 and 92 of the Evidence Act 1950 ('the EA') to contradict, vary, add to or subtract from the
B written terms of the SA? and

(ii) what is a commercially sensible construction of the SA?

(d) whether the adjudicator had jurisdiction under CIPAA to adjudicate PBB's claim;

C (e) did the adjudicator exceed his jurisdiction under s 15(d) read with s 27(1) of the CIPAA when he adjudicated PBB's claim?

(f) whether the adjudicator had breached the second rule of natural justice (second rule) under ss 15(b) and 24(c) of the CIPAA:

D (i) by not giving 'proper consideration' to the SA and/or BCD's evidence, including PBB's letter dated 11 July 2018 to BCD ('exh A8'); and

(ii) when he did not deal with all the contentions advanced by BCD in
E the adjudication;

(g) did the adjudicator breach s 12(4) of the CIPAA by not giving any reason in the AD with regard to exh A8?

F (h) was PBB estopped from proceeding with PBB's claim in the adjudication by reason of PBB's silence or inaction regarding PBB's claim for nearly four years? If PBB was estopped from adjudicating PBB's claim, whether the application of the equitable doctrine of estoppel would:

(i) deprive the adjudicator of jurisdiction under CIPAA to adjudicate
G PBB's claim; or

(ii) mean that the adjudicator had exceeded his jurisdiction under s 15(d) read with s 27(1) of the CIPAA when he adjudicated PBB's claim.

H (i) regarding BCD's stay application, should the court exercise its discretion under s 16(1)(b) of the CIPAA to stay the execution of AD pending the outcome of the arbitration; and

(j) in respect of PBB's enforcement application, should the court grant leave
I pursuant to s 28(2) of the CIPAA for the AD to be enforced against BCD?

E. CAN THE COURT CONSIDER NEW EVIDENCE IN APPLICATIONS TO SET ASIDE ADJUDICATION DECISIONS?

[9] Section 15 of the CIPAA states as follows:

> 15 *Improperly procured adjudication decision*
>
> *An aggrieved party may apply to the High Court to set aside an adjudication decision on one or more of the following grounds*:
>
> (a) *the adjudication decision was improperly procured through fraud or bribery*;
>
> (b) *there has been a denial of natural justice*;
>
> (c) *the adjudicator has not acted independently or impartially*; *or*
>
> (d) *the adjudicator has acted in excess of his jurisdiction*. (Emphasis added.)

[10] Mr Lam had strenuously objected to the admissibility of BCD's evidence adduced in these two OS on the ground that BCD's evidence had not been tendered in the adjudication.

[11] I am not able to find any previous Malaysian case which has decided on whether new evidence may be adduced in support of X's setting aside application when the new evidence has not been tendered by X in the adjudication proceedings. I am of the following opinion:

(1) there is nothing in s 15 or any other provision in CIPAA which prevents X from adducing new evidence in support of X's setting aside application, especially when the new evidence concerns a matter which has occurred after the delivery of the adjudication decision;

(2) if I have decided that X cannot adduce the new evidence to support X's setting aside application, this may cause an injustice to X in cases where X cannot, with reasonable diligence, procure the new evidence for the purpose of the adjudication proceedings. After the conclusion of adjudication proceedings, there is always a possibility that X may obtain new evidence to substantiate any of the grounds stipulated in s 15(a)–(d) of the CIPAA;

(3) s 15 of the CIPAA does not prevent a party in whose favour an adjudication decision is made (Y) from tendering new evidence to resist X's setting aside application and/or support Y's application for leave of court to enforce the adjudication decision pursuant to s 28(1) and (2) of the CIPAA;

(4) as an adjudicator has a strict timeline under s 12(2)(a)–(c) and (3) of the CIPAA to deliver the adjudication decision, X and Y (X/Y) also have a tight deadline to produce documents in the adjudication proceedings as set by the adjudicator pursuant to s 25(c) of the CIPAA. In view of such

a time constraint, it is understandable if X/Y may have inadvertently fail to adduce the new evidence in the adjudication proceedings;

(5) no prejudice is occasioned by the court admitting new evidence in X's setting aside application as the party who is served with the new evidence may rebut the new evidence by way of affidavit and submission (written and oral); and

(6) if new evidence is adduced in X's setting aside application by X/Y, there should be a reasonable explanation on affidavit evidence by X/Y regarding why the new evidence could not be tendered by X/Y in the adjudication proceedings ('reasonable explanation (affidavit)'). If there is no reasonable explanation (affidavit), this may cast doubt on the:

(a) weight of the new evidence; and

(b) bona fides of X/Y in adducing the new evidence.

[12] As explained in the above sub-paras 11(1), (2), (4) and (5), BCD cannot be prevented by s 15 or any other provision in CIPAA from tendering BCD's evidence in support of BCD's setting aside application. Having said that, I find that BCD's evidence cannot support BCD's setting aside application. My reasons are as follows:

(a) as explained in para 14 below, by virtue of ss 91 and 92 of the EA, BCD's evidence cannot be admitted to contradict, vary, add to or subtract from the written terms of the SA;

(b) BCD's evidence concerned matters which arose before the adjudication. However, none of BCD's affidavits had explained why BCD's evidence could not have been tendered by BCD in the adjudication, especially when BCD is represented by solicitors (who also act for BCD in these two OS). More disconcerting is the fact that BCD's evidence was first alluded to in BCD's second affidavit and not in the BCD's first affidavit in support of BCD's setting aside application ('BCD's first affidavit'). If BCD's evidence were true, it was inconceivable for BCD's first affidavit to have omitted BCD's evidence;

(c) during the hearing of the two OS, I asked Mr Sanjay whether there was any reason why BCD's evidence could not have been adduced by BCD in the adjudication. In Mr Sanjay's usual forthrightness, he answered that he had no explanation to proffer on behalf of BCD; and

(d) with regard to exh A5:

(i) there was no evidence that exh A5 had been sent to PBB; and

(ii) Dato' Kwan's Police Report had been lodged with respect to exh A5.

F. SA

F(1). Effect of ss 91 and 92 of the EA

[13] Sections 91 and 92 of the EA provide as follows:

s 91 *Evidence of terms of contracts*, grants and other dispositions of property *reduced to form of document*

When the terms of a contract or of a grant or of any other disposition of property *have been reduced by or by consent of the parties to the form of a document*, and in all cases in which any matter is required by law to be reduced to the form of a document, *no evidence shall be given in proof of the terms of the contract*, grant or other disposition of property or of the matter *except the document itself*, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained.

...

s 92 *Exclusion of evidence of oral agreement*

When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, *have been proved according to section 91, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to, or subtracting from its terms*:

Provided that —

(a) any fact may be proved which would invalidate any document or which would entitle any person to any decree or order relating thereto, such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, the fact that it is wrongly dated, want or failure of consideration, or mistake in fact or law;

(b) the existence of any separate oral agreement, as to any matter on which a document is silent and which is not inconsistent with its terms, may be proved, and in considering whether or not this proviso applies, the court shall have regard to the degree of formality of the document;

(c) the existence of any separate oral agreement constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved;

(d) the existence of any distinct subsequent oral agreement, to rescind or modify any such contract, grant or disposition of property, may be proved except in cases in which the contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents;

(e) any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description may be proved if the annexing of any such incident would not be repugnant to or inconsistent with the express terms of the contract; and

A (f) any fact may be proved which shows in what manner the language of a document is related to existing facts. (Emphasis added.)

[14] Firstly, BCD cannot rely in this case on the application of any one of the provisos (a)–(f) of s 92 of the EA to the SA — please refer to the Supreme Court's judgment delivered by Wan Hamzah SCJ in *Ho Shee Jan v Hadayat Harta Holdings Sdn Bhd* [1989] 1 MLJ 33 at p 35. As such, premised on Chang Min Tat FJ's judgment in the Federal Court case of *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229 at pp 232–233, ss 91 and 92 of the EA apply to the SA whereby no evidence can be adduced by BCD, including BCD's evidence or any extrinsic evidence, to:

(a) contradict;

(b) vary;

(c) add to; or

(d) subtract from

– the contents of the SA.

F(2). Does SA include sum (ICR No 4R)?

[15] The SA is a commercial contract. As such, the SA should be interpreted in a commercially sensible manner as explained by the Federal Court's judgment delivered by Gopal Sri Ram FCJ in *Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd* [2010] 1 MLJ 597 at [10].

[16] Adopting a commercially sensible construction of the SA, the adjudicator was correct in deciding that the SA had not extinguished BCD's liability for the sum (ICR No 4R) (in the AD, Part L (Reason and Conclusion on Issues), para 12.1, Issue C). The following reasons support this commercially sensible interpretation of the SA:

(a) in recital 2 to the SA ('recital 2'), BCD had acknowledged that BCD was indebted to PBB in a sum of RM6,103,387.64 ('settlement sum') pertaining to 'Certificates No 28 to 35' of the project. Recital 2 did not mention ICR No 4R. The court may refer to a recital to a contract in the construction of the contract — please see the judgment of Gopal Sri Ram JCA (as he then was) in the Court of Appeal case of *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 719 at p 732;

(b) cl 1.1 SA ('cl 1.1') had expressly provided that in consideration of BCD's agreement to pay the settlement sum, PBB had agreed to accept the payment of the settlement sum in the manner provided in paras (a)–(h) of cl 1.1; and

(c) if I have accepted BCD's submission based on BCD's evidence that the SA included the sum (ICR No 4R), this will allow BCD's evidence to contradict recital 2 and cl 1.1 which is contrary to ss 91 and 92 of the EA — please refer to the above para 14.

G. WHETHER THE ADJUDICATOR HAD JURISDICTION UNDER CIPAA TO ADJUDICATE PBB'S CLAIM

[17] Sections 13(a), (c), 24(c) and 27(1) of the CIPAA provide as follows:

> 13 *Effect of adjudication decision*
>
> *The adjudication decision is binding unless —*
>
> (a) *it is set aside by the High Court on any of the grounds referred to in section 15*;
>
> ...
>
> (c) *the dispute is finally decided by arbitration or the court*.
>
> 24 *Duties and obligations of the adjudicator*
>
> *The adjudicator shall at the time of the acceptance of appointment as an adjudicator make a declaration in writing that —*
>
> ...
>
> (c) *he shall comply with the principles of natural justice*;
>
> ...
>
> 27 *Jurisdiction of adjudicator*
>
> (1) *Subject to subsection (2), the adjudicator's jurisdiction in relation to any dispute is limited to the matter referred to adjudication by the parties pursuant to sections 5 and 6*. (Emphasis added.)

[18] Mr Sanjay has contended that based on the SA, PBB's claim is extinguished and PBB therefore had no valid cause of action against BCD based on ICR No 4R. Consequently, the adjudicator had no jurisdiction to adjudicate PBB's claim under CIPAA. In support of his submission, he has cited a host of cases decided in Malaysia, UK, Singapore and Australia.

[19] Firstly, as explained in the above paragraph 16, the SA did not include the sum (ICR No 4R). Hence, PBB had a valid cause of action based on ICR No 4R and the adjudicator had jurisdiction to adjudicate PBB's claim under CIPAA. All the cases cited by Mr Sanjay can be clearly distinguished because

the settlement agreements or compromises in those cases have clearly extinguished or compromised the claimants' cause of action (unlike the SA in this case).

[20] The interpretation of an agreement is a finding of law — please refer to the Federal Court's judgment delivered by Jeffrey Tan FCJ in *Far East Holdings Bhd & Anor v Majlis Ugama Islam dan Adat Resam Melayu Pahang and other appeals* [2018] 1 MLJ 1 at [125] and [150(a)]. Even if the adjudicator had erred in deciding that the SA excluded the sum (ICR No 4R), namely the adjudicator had made an error of law regarding the construction of the SA ('adjudicator's error (SA)'), the adjudicator's error (SA) can be easily remedied in the arbitration because the AD is only 'temporarily final' and is subject to the arbitration under s 13(c) of the CIPAA — please see *Naza Engineering & Construction Sdn Bhd v SSL Dev Sdn Bhd* [2020] 9 MLJ 499 at [14].

H. DID THE ADJUDICATOR EXCEED HIS JURISDICTION UNDER CIPAA BY ADJUDICATING PBB'S CLAIM?

[21] As explained in *MKP Builders Sdn Bhd v PC Geotechnic Sdn Bhd and another case* [2020] MLJU 1927 at [13] and [14], there are two different grounds to set aside an adjudication decision, namely:

(a) an adjudicator has no jurisdiction to adjudicate the matter under CIPAA ('lack of jurisdiction argument'); *or*

(b) an adjudicator has jurisdiction to adjudicate the matter under s 27(1) read with ss 5 and 6 of the CIPAA but has exceeded such a jurisdiction pursuant to s 15(d) of the CIPAA ('excess of jurisdiction argument').

[22] I have addressed Mr Sanjay's lack of jurisdiction argument in the above para 19.

[23] For the sake of completeness, the adjudicator did not exceed his jurisdiction pursuant to s 15(d) of the CIPAA by adjudicating that the SA excluded the sum (ICR No 4R). Even if it is assumed that the adjudicator's error (SA) has been made, the adjudicator's error (SA) does not mean that the adjudicator has exceeded his jurisdiction to adjudicate PBB's claim under CIPAA within the meaning of s 15(d) of the CIPAA.

I. DID THE ADJUDICATOR BREACH SECOND RULE?

[24] Mr Sanjay has contended that the second rule under ss 15(b) and 24(c) of the CIPAA was breached by the adjudicator when he did not give 'proper consideration' to the SA and/or BCD's evidence (including exh A8).

[25] I am of the view that the adjudicator had not breached the second rule in this case. This decision is premised on the following reasons: A

(a) it is clear from the AD that the adjudicator did consider BCD's defence regarding the SA — please see the judgment of the Federal Court delivered by Zulkefli PCA in *View Esteem Sdn Bhd v Bina Puri Holdings Bhd* [2018] 2 MLJ 22; [2019] 5 CLJ 479 at [65]–[66] and [74]; and B

(b) before delivering the AD, the adjudicator had given BCD its right to adduce evidence and to submit on all the questions which arose in the adjudication — please refer to David Wong Dak Wah JCA's (as he then was) decision in the Court of Appeal in *ACFM Engineering & Construction Sdn Bhd v Esstar Vision Sdn Bhd and another appeal* [2016] MLJU 1776 at [20]. C

[26] I should emphasise that the second rule does not require adjudicators to discuss every contention submitted in the adjudication proceedings. It has been decided in *Prestij Mega Construction Sdn Bhd v Personal Representative of Estate of Vinayak Pradhan Prabhakar (deceased) & Ors and other cases* [2021] MLJU 60; [2021] AMEJ 48 at [69], as follows: D

> [69] *Firstly, View Esteem, at [65], [66] and [74], has decided that an adjudicator would have breached the second Rule if the adjudicator did not consider a defence raised in the adjudication proceedings. View Esteem did not however decide that an adjudicator must address each and every submission made by parties in the AD. This is understandable because by virtue of s 12(2)(a) to (c) CIPAA, an adjudicator has to deliver an adjudication decision within a tight timeline. Furthermore, the Object (CIPAA) can only be attained if adjudicators deliver AD's expeditiously so as to ensure that parties who perform construction work are not deprived of cash flow in the form of payment for their construction work.* (Emphasis added.) E F

[27] Even if it is assumed that the adjudicator had breached the second rule in this case ('alleged breach (second rule)'), nevertheless this court will still not set aside the AD because: G

(a) there is no 'real possibility' that without the alleged breach (second rule), the learned adjudicator would have reached a different decision — please refer to the judgment of the Court of Appeal delivered by Harmindar Singh JCA (as he then was) in *Guangxi Dev & Cap Sdn Bhd v Sycal Bhd* [2018] MLJU 1542; [2019] 1 CLJ 592 at [32]; and H

(b) BCD has not adduced any evidence in this case to show that the alleged breach (second rule) is 'decisive' or 'material' to the AD which warrants the court to set aside the AD pursuant to ss 15(b) and 24(c) of the CIPAA — please see the judgment of Mary Lim Thiam Suan J (as she then was) in the High Court in *Ranhill E & C Sdn Bhd v Tioxide (M) Sdn Bhd and other appeals* [2015] MLJU 1873; [2015] 1 LNS 1435 at [82]. I

J. SCOPE OF THE COURT'S POWER UNDER S 15 OF THE CIPAA

[28] The nature of the court's power to set aside an adjudication decision under s 15(a)–(d) of the CIPAA has been explained in *NAZA Engineering & Construction* at [14], as follows:

> [14] *My understanding of the court's power to set aside an AD is as follows*:
>
> (1) *CIPAA does not provide a right to any party to an AD to appeal against the AD*;
>
> (2) *an AD is provisional under s 13(a) to (c) CIPAA and may be set aside by the High Court pursuant to any of the paragraphs in s 15(a) to (d) CIPAA (Setting Aside Application). A Setting Aside Application is not an appeal to the High Court against the AD. Nor is a Setting Aside Application a judicial review of the AD. Hence, the High Court cannot review the merits of an AD in a Setting Aside Application — please see the Court of Appeal's judgment delivered by David Wong Dak Wah JCA (as he then was) in ACFM Engineering & Construction Sdn Bhd v Esstar Vision Sdn Bhd and another appeal* [2016] MLJU 1776, at [21];
>
> ...;
>
> (4) *the court cannot set aside an AD merely because —*
>
> (a) *an error of law has been committed by an adjudicator unless the adjudicator has answered a 'wrong' question of law (which does not arise from the dispute to be adjudicated upon) — please see the judgment of Lee Swee Seng J (as he then was) in the High Court in Econpile (M) Sdn Bhd v IRDK Ventures Sdn Bhd & another case* [2017] 7 MLJ 732; [2016] 5 CLJ 882, at [71];
>
> (b) *an adjudicator has interpreted erroneously a provision in the construction contract — Econpile*, at [67];
>
> (c) *relevant evidence has been excluded wrongly by an adjudicator*;
>
> (d) *an adjudicator has admitted improperly irrelevant evidence*;
>
> (e) *an adjudicator has failed to attach weight to relevant evidence, oral or documentary*;
>
> (f) *undue weight has been given by an adjudicator to any piece of evidence*;
>
> (g) *an adjudicator has assessed erroneously the evidence presented to the adjudicator*;
>
> (h) *documentary evidence has been misconstrued by an adjudicator*;
>
> (i) *a plain error regarding a finding of fact has been made by an adjudicator*;
>
> (j) *an adjudicator has omitted to make a finding of fact which can be adequately supported by evidence*;
>
> (k) *an erroneous finding of mixed fact and law has been arrived at by an adjudicator — please see Lee Swee Seng J's decision in the High Court in Syarikat Bina Darul Aman Bhd & Anor v Government of Malaysia* [2017] MLJU 673; [2017] 4 AMR 477, at [60];

(l) *an adjudicator has drawn a wrong inference from the evidence; and*

(m) *an adjudicator has omitted to make the right inference from the evidence.*

The above errors and omission by an adjudicator may be rectified by an arbitration or litigation regarding the dispute in question (as provided in s 13(c) of the CIPAA) — Econpile, at [67]; ... (Emphasis added.)

[29] According to Mr Sanjay, the adjudicator had failed to consider the contents of exh A8 which stated as follows, among others:

[PBB's letterhead]

11th July 2018

[BCD]

...

We further refer to the meeting between our Mr Lee Sing Ting (Chief Financial Officer) and your [Ms Lim] and Margaret Wong (Finance Manager) on 6th July 2018 whereby you have forwarded to us your Statement of Account pertaining to Certificates No. 28 to 35.

We hereby confirm the sum of RM6,103,387.64 as stated in the said Statement of Account as an accurate representation of the total outstanding due to us. ... (Emphasis added.)

[30] Firstly, exh A8 only concerned 'Certificates No 28 to 35' of the project (not ICR No 4R). In other words, exh A8 is not relevant for the adjudication regarding the sum (ICR No 4R).

[31] Secondly, by virtue of ss 91 and 92 of the EA BCD cannot rely on exh A8 to contradict, vary, add to or subtract from the terms of the SA — please see the above para 14.

[32] Thirdly, the adjudicator's construction of a document, such as exh A8, is a question of law — *Far East Holdings* at [150(i)] and [156]. Even if the adjudicator had erred in his interpretation of the contents of exh A8 ('adjudicator's error (exh A8)'), as explained in *NAZA Engineering & Construction*, in deciding BCD's setting aside application under s 15 of the CIPAA, the court is not exercising any appellate or supervisory function. Hence, the court cannot set aside the AD even if the adjudicator's error (exh A8) has been committed.

[33] Lastly, the adjudicator's error (exh A8), like all other errors or omission by the adjudicator, should be rectified in the arbitration as the AD is subject to the arbitration under s 13(c) of the CIPAA — *NAZA Engineering & Construction*, at [14].

K. DID THE ADJUDICATOR BREACH S 12(4) OF THE CIPAA WITH REGARD TO EXH A8?

[34] Section 12(4) of the CIPAA states as follows:

> *The adjudication decision* shall be made in writing and *shall contain reasons for such decision unless the requirement for reasons is dispensed with by the parties*. (Emphasis added.)

[35] Mr Sanjay has submitted that s 12(4) of the CIPAA had been contravened by the adjudicator when he did not give any reason in the AD regarding exh A8.

[36] I am not able to accept the above contention by BCD. This is because firstly, for the reasons stated in the above paras 30–33, BCD cannot rely on exh A8 to resist PBB's claim. Furthermore, I am of the view that the adjudicator did not breach s 12(4) of the CIPAA because he had given adequate reasons in the AD on why he had adjudicated in the manner he did. The scope of s 12(4) of the CIPAA has been explained in *MRCB Builders Sdn Bhd v Wazam Ventures Sdn Bhd and another case* [2020] MLJU 208; [2020] 5 MLRH 138 at [23]–[25], as follows:

> [23] *Firstly, I should point out that by virtue of paragraph 22 of Part 1 of [the Scheme for Construction Contracts (England and Wales) Regulations 1998], an adjudicator in UK is not obliged to give reasons for an adjudication decision unless requested by one of the parties to the dispute. This position in UK is different from our s 12(4) CIPAA.*
>
> [24] *Secondly, it is decided by Mary Lim Thiam Suan J (as she then was) in Ranhill E & C*, at [70], *as follows*:
>
> > [70] *Subsection 12(4) further requires the decision to be in writing. It must also contain 'reasons for such decision unless the requirement for reasons is dispensed with by the parties'. I would not construe the requirement of 'reasons' here to be one that must be full as one would generally see in judgments of the Court or even arbitration awards. What would be required is at the very least, a statement of the adjudicator's reasons for coming to the decision reached. Brevity is not a reason for complaint. The reasons may be succinct, enough or sufficient to show that the adjudicator has dealt with the very issues remitted to him and what his conclusions are on those issues. The reasons may be wrong on the facts or even the law but I do not believe that is enough cause to interfere. The Courts must exercise considerable restraint when invited to set aside an adjudication decision reached in very exacting circumstances and conditions. So much so that it will only be in rare and extreme circumstances that the reasons, brief or otherwise, are found wanting*. (Emphasis added.)
>
> [25] *I am of the following view regarding s 12(4) CIPAA*:
>
> (1) *the use of the mandatory term 'shall' in s 12(4) CIPAA clearly shows that this provision is intended by the legislature to be mandatory. Having said that, as explained in Ranhill E & C, an adjudicator complies with s 12(4) CIPAA if*

he or she provides at least one reason, however brief, for the adjudication decision;

(2) *if an adjudicator does not give any reason for an adjudication decision, this is a breach of s 12(4) CIPAA which may support a contention that the adjudicator has breached the second Rule by his or her failure to consider a possible defence (as required by View Esteem and Guangxi Dev & Cap); and*

(3) *if an adjudicator has given at least one reason for an adjudication decision, the court cannot review the legality, correctness and adequacy of the reason. It is decided in (Naza Engineering & Construction)* ... (Emphasis added.)

L. WHETHER PBB WAS ESTOPPED FROM PROCEEDING WITH PBB'S CLAIM

[37] Mr Sanjay has attempted to persuade this court that the adjudicator had erred by not considering the 'prolonged silence and/or non-action by PBB for approximately four years'. The effect of this contention is that the adjudicator should have adjudicated that PBB was estopped by its own conduct from proceeding with PBB's claim.

[38] I am not able to accept that PBB is estopped by its own conduct from adjudicating PBB's claim because:

(a) in an affidavit affirmed by Mr Shenton Maniam (PBB's in-house legal counsel) on 29 July 2020, PBB did not realise that BCD owed the sum (ICR No 4R) to PBB until an audit on PBB's accounts was conducted in March, 2019. Hence, PBB was not estopped from proceeding with PBB's claim;

(b) the adjudicator had correctly adjudicated that there was no evidence of acquiescence by PBB to waive PBB's claim (in the AD, Part L (Reason and Conclusion on Issues), para 12.1, Issue C) and consequently, PBB was not estopped from proceeding with PBB's claim; and

(c) even if the adjudicator had erred in failing to apply the equitable doctrine of estoppel against PBB ('adjudicator's error (estoppel)') the adjudicator's error (estoppel) can be remedied in the arbitration— *NAZA Engineering & Construction* at [14].

[39] I should take this opportunity to clarify that even if the equitable doctrine of estoppel can be invoked against a claimant in an adjudication proceedings (not in this case), this does *not* mean that the adjudicator:

(a) has no jurisdiction under CIPAA to adjudicate the claim in question; or

(b) has exceeded his jurisdiction under s 15(d) read with s 27(1) of the CIPAA when he adjudicated the claim.

A M. OUTCOME OF BCD'S SETTING ASIDE APPLICATION

[40] As explained in the above Parts E to L, I have no hesitation to dismiss BCD's setting aside application.

B N. BCP'S STAY APPLICATION

[41] Section 16 of the CIPAA provides as follows:

16 *Stay of adjudication decision*

C (1) *A party may apply to the High Court for a stay of an adjudication decision in the following circumstances*:

(a) an application to set aside the adjudication decision under section 15 has been made; or

D (b) *the subject matter of the adjudication decision is pending final determination by arbitration* or the court.

(c) *The High Court may grant a stay of the adjudication decision or order the adjudicated amount or part of it to be deposited with the Director of the KLRCA or make any other order as it thinks fit*. (Emphasis added.)

E

[42] In *View Esteem* at [79] and [82], the Federal Court has decided that the court may exercise its discretion under s 16(1)(b) of the CIPAA to grant a stay of the enforcement of an adjudication decision when:

F (a) there is a clear and unequivocal error in the adjudication decision ('first ground (*View Esteem*)'); *or*

(b) it is just for the court to grant a stay of the execution of the adjudication decision ('second ground (*View Esteem*)').

G

[43] As elaborated in the above Parts E to L, the adjudicator had not made any clear and unequivocal error in the AD. There is thus no reason to apply the first ground (*View Esteem*) in this case.

H **[44]** I am unable to allow BCD's stay application on the second ground (*View Esteem*). This decision is due to the following reasons:

(a) there is no evidence in this case to show that PBB is commercially insolvent in the sense that PBB is unable to pay its debts when these debts fall due for payment. It is clear that PBB is still an on-going business I concern;

(b) no winding up petition has been presented against PBB;

(c) no suit has been filed against PBB by its bankers, creditors, suppliers or customers for any debt due from PBB to them; and

(d) there is no evidence to persuade this court that:

(i) if BCD pays to PBB the amount adjudicated by the adjudicator ('adjudicated amount'); and

(ii) if BCD is successful in the arbitration — there is a likelihood or real risk that PBB is unable to repay the adjudicated amount to BCD.

[45] In any event, BCD bears the onus to persuade the court to exercise its discretion under s 16(1)(b) of the CIPAA to allow BCD's stay application — please refer to *Kurniaan Maju Sdn Bhd v HSA Setiamurni Sdn Bhd* [2020] 9 MLJ 103 at [14]. Premised on the evidence adduced in this case, I am not satisfied that BCD has succeeded to discharge such a burden. Accordingly, I am constrained to dismiss BCD's stay application.

O. PBB'S ENFORCEMENT APPLICATION

[46] Section 28(1) and (2) of the CIPAA state as follows:

s 28 *Enforcement of adjudication decision as judgment*

(1) *A party may enforce an adjudication decision by applying to the High Court for an order to enforce the adjudication decision as if it is a judgment or order of the High Court.*

(2) *The High Court may make an order in respect of the adjudication decision either wholly or partly and may make an order in respect of interest on the adjudicated amount payable.* (Emphasis added.)

[47] In the Court of Appeal case of *Inai Kiara Sdn Bhd v Puteri Nusantara Sdn Bhd* [2019] 2 MLJ 362; [2019] 2 CLJ 229 at [24]–[26], Mary Lim Thiam Suan JCA (as she then was) has explained that the court may exercise its discretion to grant leave under s 28(1) and (2) of the CIPAA to enforce an adjudication decision if the following three conditions ('three conditions (enforcement)') are fulfilled:

(a) the adjudication decision has been made in favour of the party applying for leave;

(b) the party against whom an adjudication decision has been made, has failed to pay the adjudicated amount on the date specified in the adjudication decision; and

(c) there is no prohibition on the court's discretionary power to grant leave to enforce the adjudication decision.

[48] I am satisfied that PBB has fulfilled the three conditions (enforcement) in this case. As such, PBB's enforcement application is allowed.

P. THE COURT'S DECISION

[49] Based on the above reasons:

(a) BDS's setting aside application is dismissed;

(b) BDS's stay application is dismissed;

(c) PBB's enforcement application is allowed; and

(d) as both the OS are heard together, BDS shall pay one set of costs to PBB.

Order accordingly.

Reported by Ashok Kumar